

Appl. No. 10/678,206
Docket No. 9049
Amdt. dated August 27, 2008
Reply to Office Action mailed on
Customer No. 27752

REMARKS

Claim Status

Claims 28 and 29 have been added. Support for new claims 28 and 29 is found in the specification at page 3, lines 31-32, page 4, lines 14-25, as well as in Figures 2 and 3. No additional claims fee is believed to be due.

It is believed these changes do not involve any introduction of new matter. Consequently, entry of these changes is believed to be in order and is respectfully requested.

Rejections Under 35 USC 102(b) Over WO 00/69308

Claims 17-19 and 27 are rejected under 35 U.S.C. 102(b) as being anticipated by WO 00/69308 (hereinafter the '308 application). The Office asserts that, with regard to claims 17 and 27, the '308 application discloses a hair treatment applicator (figs. 3 and 4) comprising a handle (the container to which the cap 1 screw into), a head (1) connected to the handle, the head comprising a first retaining structure (at 5, fig. 4) including a first base (14, fig. 8), a first plurality of tines (5) extending from the base, a first baffle (10, fig. 4) extending from the base which together form a first retaining volume, a second retaining structure (at 5) including a second base (14, fig. 8), a second plurality of tines (5) extending from the second base, a second baffle (10, fig. 4) extending from the second base which together form a second retaining volume; a passage (figs. 3, 4) between first and second baffles, wherein the passage is capable of being free of hair treatment (the Office notes that the limitation "substantially free of said hair treatment" is broad as there exists different types of hair treatment depending on the viscosity of the hair treatment, if the hair treatment of the '308 application is viscous, then the passage is free of hair treatment; and it also depends on how much material is poured into each of the retaining structures, if only a little amount of material is applied to each of the retaining structures, then the passage 4 is free of the material); a hair treatment (translated abstract) contained in the first and second retaining structures. With regard to claims 18 and 19, the Office asserts that the '308 application

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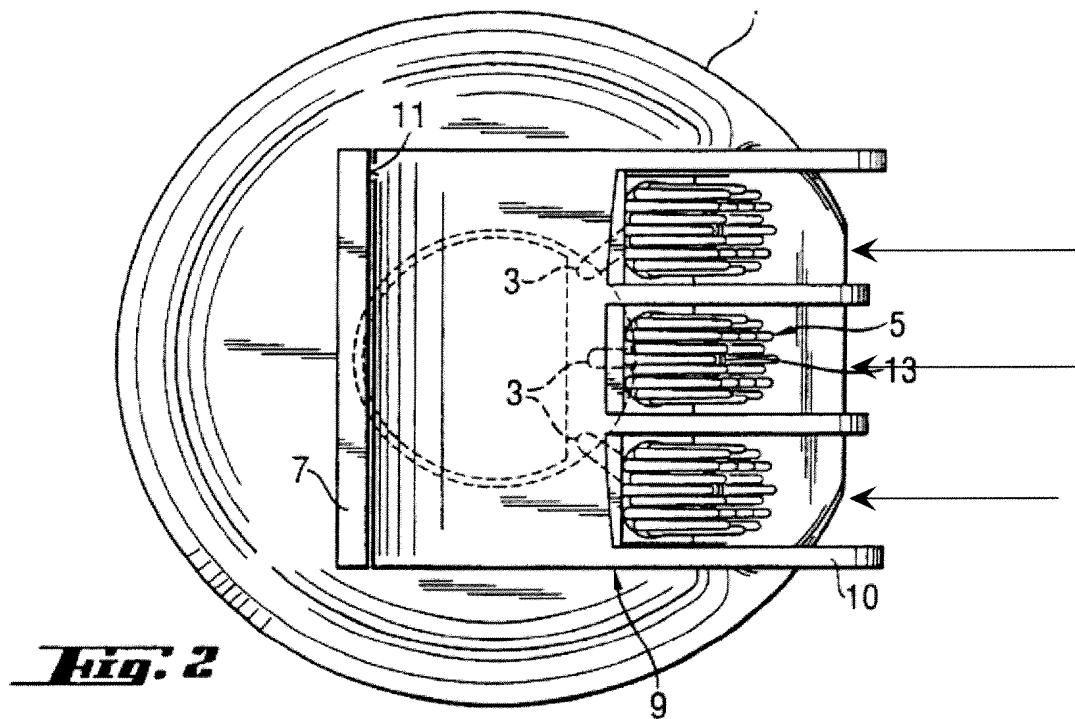
discloses first and second tines that extend substantially perpendicularly to the first and second base (figs. 3, 4). Applicant respectfully traverses the present rejection based on the following comments. Of note, throughout this response, reference is made to U.S. Pat. No 6,688,314 (hereinafter the '314 patent), which is the U.S. national patent derived from the (international) '308 application.

Under 102(b), a claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference. Verdegaal Bros. V. Union Oil Co. of California, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). In this case, the '308 application does not teach each and every element of claims 17-19 and 27.

Each of claims 17-19 and 27 requires a first retaining structure comprising a first baffle, a second retaining structure comprising a second baffle, and a passage extending between the first and second baffles, the passage being substantially free of hair treatment and configured to receive a strand of hair without exposing the strand of hair to hair treatment contained in the first and second retaining structures. The Office asserts that the '308 application discloses a passage (figs. 3, 4) between first and second baffles, wherein the passage is capable of being free of hair treatment. The Office further asserts that if the hair treatment of the '308 application is viscous, then the passage (4) is free of hair treatment. The Office also asserts that if only a small amount of material is applied to each of the retaining structures, then the passage (4) is free of the material. The Applicant respectfully submits that there is no support for these assertions in the '308 application or elsewhere. These assertions represent mere conjecture on the part of the Office and are not backed by evidence or the knowledge of one skilled in the art. Nonetheless, the Applicant presents arguments to traverse these assertions.

Contrary to the Office's assertions, the passage(s) (4) between the prongs/baffles of the '308 device are not substantially free of hair treatment and are not capable of being free of hair treatment. The outlet openings of the product guides are disposed between the prongs ("each product guide is arranged between two mutually opposite guide prongs", '314 patent,

col. 2, lines 50-51). Hair colorant is dispensed through the outlet openings. The passage(s) (4), therefore, can never be substantially free of hair treatment, as hair treatment is dispensed into the passage(s). Regardless of the nature of the hair treatment, e.g., viscosity, or the amount that is dispensed, it is dispensed into the passage(s) (see below).



The '314 patent teaches that the "prongs narrow the outlet regions of the hair colorant" ('314 patent, col. 2, lines 38-41). The passage(s) will thus, by definition, contain the hair colorant. If the passage(s) were substantially free of hair colorant, this would indicate that the applicator device was not functioning properly to dispense hair colorant (e.g., outlets clogged).

Furthermore, with regard to new claims 28 and 29, both of these claims require that the first and second plurality of tines be disposed on the respective bases such that each of the plurality of tines is comprised within a first row of two or more tines aligned in a direction substantially parallel to the longitudinal axis of the handle and a second row of two

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or more tines aligned in a direction substantially perpendicular to the longitudinal axis of the handle. The '308 application does not teach this arrangement of tines. Rather, the '314 patent teaches an applicator device having a number of bores and a "*ring-shaped* bunch 5 of bristles" extending outwardly around each bore (emphasis added) ('314 patent, col. 4, lines 60-65).

Thus, the '308 application does not teach each and every element of claims 17, 27, and 29, as well as claims 18 and 19, which depend from claim 17, and claim 28, which depends from claim 27. Thus, claims 17-19, 27, 28, and 29 are novel over the '308 application.

Rejections Under 35 USC 103(a) Over WO 00/69308

Claims 20-26 are rejected under 35 U.S.C. 103(a) as being unpatentable over WO 00/69308. The Office acknowledges that, with regard to claims 20-26, the '308 application discloses the essential claimed invention *except* for the handle being integrally molded with the retaining structures, the applicator being molded as single piece and being made of polyethylene; the '308 application also fails to show the shape of the tines being frusto-conical, each tine with a proximal end diameter being .125 to .3125 inches and a distal end diameter of .0625 to .375 inches, a height of each tine being .25 inches to 1 inches and the passage width being at least .25 inches. The Office asserts, however, that it would have been obvious to one having an ordinary skill in the art at the time the invention was made to form the handle and the applicator as a single piece, since it has been held that forming in one piece an article which has formerly been formed in two pieces and put together involves only routine skill in the art. The Office further asserts that it would have been obvious to one having an ordinary skill in the art at the time the invention was made to employ the applicator being made of polyethylene, since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice, citing In re Leshin, 125 USPQ 416. And, according to the Office, it would have been obvious to one having an ordinary skill in the art

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at the time the invention was made to construct each tine with a proximal end diameter being .125 to .3125 inches and a distal end diameter of .0625 to .375 inches, a height of each tine being .25 inches to 1 inches and the passage width being at least .25 inches, since such a modification would have involved a mere change in the size of the known component (A change in size is generally recognized as being within the level or ordinary skill in the art. In re Rose, 105 USPQ 237 (CCPA 1955)).

Applicants respectfully traverse the present rejection based on the following comments. Specifically, the '308 application does not disclose each and every element of Applicants' claimed hair treatment applicator and, thus, does not establish a prima facie case of obviousness.

Each of claims 20-26 requires a first retaining structure comprising a first baffle, a second retaining structure comprising a second baffle, and a passage extending between the first and second baffles, the passage being substantially free of hair treatment and configured to receive a strand of hair without exposing the strand of hair to hair treatment contained in the first and second retaining structures. As detailed above, the guiding prongs of the '308 device do not bound a passage that is configured to receive a strand of hair without exposing the strand of hair to hair treatment. On the contrary, the guiding prongs of the '308 application bound and contain a volume of hair treatment, released through outlets located between the prongs. The passages between the prongs of the '308 application are not, therefore, substantially free of hair treatment, as required by the Applicant's claims.

Thus, as it fails to disclose each and every element of claims 20-26, the '308 application does not establish a prima facie case of obviousness. Consequently, Applicants' claims 20-26 are patentable over the '308 application.

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Conclusion

This response represents an earnest effort to place the present application in proper form and to distinguish the invention as claimed from the applied reference(s). In view of the foregoing, entry of the new claims presented herein, reconsideration of this application, and allowance of the pending claim(s) are respectfully requested.

Respectfully submitted,

THE PROCTER & GAMBLE COMPANY

By Melissa Krasovec

Signature

Melissa G. Krasovec

Typed or Printed Name

Registration No. 59,174

(513) 983-5228

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